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Twenty-fourth session

SUMMARY RECORD OF THE 445th MEETING

Held at the Vienna International Centre, Vienna,
on Thursday, 13 June 1991, at 9.30 a.m.

Chairman: Mr. SONO (Japan)

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The meeting was called to order at 9.40 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 2 (continued)

1. The CHAIRMAN said that the ad hoc drafting group would, at a later stage, present drafts of article 2(a) and (f) for the Commission's consideration. He hoped that they would entail only minimal changes so that it would not be necessary to await translation and the issue of conference room papers before they were discussed.

2. Mr. BERGSTEN (Secretary of the Commission) said he felt that, at the current, final, stage of negotiations, translation and the issue of conference room papers would be necessary, even if the new texts involved only minor changes.

3. The CHAIRMAN said he agreed that translation would have to be awaited if substantive changes were made. The official drafting group would, in any case, compare all the language versions in order to ensure consistency.

4. Mr. BURMAN (United States of America) proposed that a third sentence be added to article 2(f) to read: "An entity that is a payments management system is not to be taken as executing payment orders, including a wire transfer network, automated clearing house, or other communications system which transmits payment orders on behalf of its participants."

5. That amendment would meet the concern expressed by members of the Commission in that it would exclude from the definition of a "bank" such systems as INTELSAT and SWIFT.

6. Mr. LE GUEN (France) said that he would have to await a French version of the United States amendment before commenting upon it. Under French law, bodies managing payments such as automatic clearing houses were considered to be banks; the elimination of all such institutions would go beyond a simple change in terminology and would run counter both to French legislation and to current international thinking with regard to the organization of the interbank netting system.

7. Mr. SOLIMAN (Egypt) said he thought that the word "bank" was so firmly established that it might well be retained.

8. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that the representative of Morocco had, on the previous day, remarked that the term "purported sender" was used in article 4. The term should be defined in article 2.

9. The CHAIRMAN said that that was a separate proposal.

10. Mr. BURMAN (United States of America) said he thought it would be misleading to expand the term "bank" to include a large number of non-banks.

11. It was interesting to hear that, under French law, bodies transferring funds were regarded as banks, but that was not the case in his own country. His delegation had proposed at an earlier stage that the Working Group should consider the possibility of incorporating the funds transfer system as an integral part of the text and recognizing fund transfer systems as parties. Had that course been adopted, he would have agreed with the representative of France that it was necessary to take such institutions into account in the definition of the fundamental entities to be covered.

12. However, that proposal had been rejected, partly because it would have complicated the text and led to a number of structural changes. It was probably too late for the Commission to consider including such entities, though a working group might examine the question.

13. Mr. ERIKSSON (Observer for Sweden) said he thought that a wording was needed which met the concerns of the United States delegation without creating problems for others. That might, perhaps, be achieved by deleting article 2(f) and by inserting somewhere in article 2 a new sentence to the effect that what was said in the Model Law concerning banks also applied to other entities which, in the normal course of business, engaged in executing payment orders in a way similar to that of banks. It was a somewhat looser definition, but would allow all countries to interpret it in a way that might be helpful to them.

14. The CHAIRMAN pointed out that the Swedish suggestion was contrary to a decision that had already been taken.

15. Mr. HERZBERG (Observer for Israel) said that the emphasis in the definition of a bank was on debiting and crediting operations. The SWIFT system and clearing houses and other institutions were mere transmission agencies. It might suffice if it were made clear that the definition of "execution" referred only to debiting and crediting.

16. Mr. BISCHOFF (Observer for Switzerland) said he was somewhat disturbed by the United States proposal. He thought that there had been a consensus that the entities responsible for transmitting payments should not be subject to the Model Law. If the definition of the term "bank" were expanded in accordance with the United States proposal, some new elements would be introduced into the payment chain. The SWIFT system had not hitherto been considered as subject to the Model Law since it merely transmitted messages. The Swiss Interbank Clearing Institution was managed by a commercial company, but the debits and credits were carried out by the national bank. His delegation was therefore opposed to the United States amendment.

17. Mr. BURMAN (United States of America) said that his delegation did not wish to change the definition of a "bank". Indeed, if the word "merely" in the second sentence of article 2(f) were construed in a broad sense, he would have no problem with it. His concern was that computer-based interbank systems such as SWIFT, CHIPS and INTELSAT did more than merely transmit

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payment orders although they did not execute them. As the Commission had decided to expand the definition of a "bank", it must ensure that it did not unintentionally include such entities as data management systems. He was concerned that, if the Model Law did not accommodate future developments in banking practice, it might come to be regarded as a relic of the pre-computer age.

18. The CHAIRMAN said he quite understood the concern of the representative of the United States of America that entities which merely transmitted payment orders should not be included in the definition of a "bank". In fact, the Commission had already accepted that entities which did not in the ordinary course of business execute payment orders were not banks. However, the Commission, while accepting the purpose of the United States representative, seemed to have difficulty in accepting the language he had proposed.

19. Mr. BURMAN (United States of America) said that his delegation had hoped that the Commission would not produce a Model Law that was already antiquated but would prepare for future changes arising from the new electronic methods of commerce. Those engaged in future litigation would rely, not on any commentary, but on the language of the Law itself, so it was that language which was the key.

20. Mr. BERGSTEN (Secretary of the Commission) said that the basic problem was that entities engaged in credit transfers were not necessarily traditional banks. The first sentence of article 2(f) attempted to define a "bank", while the second sentence of that subparagraph was intended to ensure that the broad definition of a "bank" did not include entities such as mere transmission systems or clearing houses. There was no disagreement among the members of the Commission that mere transmitting entities, such as a telex service or SWIFT, should be excluded.

21. The representative of the United States of America wished expressly to exclude clearing houses, while the representative of France had some reservations in that regard. In fact, there were different types of clearing houses: the traditional clearing house received a message, recorded the amount received from the sender and the amount sent to the recipient, sent the message and netted off; entities such as FEDWIRE, however, did not undertake a netting operation but maintained a special account which was debited or credited.

22. He thus distinguished three types of entity: firstly, the merely transmitting entity not covered by the Model Law; secondly, the traditional netting clearing house which, he believed, should not be covered by the Model Law either; and, thirdly, the type of clearing house where there was both transmission and debiting and crediting of accounts. The latter, in his view, should be covered. It was for the Commission to decide, however, which of the three types of entity he had described should be excluded from the definition of a "bank".

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23. The new third sentence which the United States representative proposed should be added to subparagraph (f) of article 2 was an alternative way of defining the entities which were not banks, namely, by listing them. It was for the Commission to decide whether the exclusion of such entities could be achieved by a definition, as in the case of the existing draft text of subparagraph (f), or by a listing of the excluded entities.

24. The CHAIRMAN said that the Commission had already agreed on the definition of a "bank", and thus on the scope of the Model Law which, he assumed, was acceptable to members in terms of the conditions in their own countries. In his view, therefore, the existing text had the flexibility to accomodate variations around the world and changes in the future.

25. Mr. LE GUEN (France) said his delegation agreed that mere transmitting entities, even where there was an element of value added, such as SWIFT, should be excluded from the definition of a "bank". A blanket exclusion of automated clearing houses would, however, be dangerous, since, even if they had not yet engaged in banking activities, they might well do so in the future.

26. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that the main concern was not so much to define a "bank", as to ensure that the Model Law applied to as wide a range of credit transfers as possible. A more comprehensive term for "bank" was needed in order to accommodate all the entities which legally executed payment orders.

27. Mr. GREGORY (United Kingdom) said that, while it was important that the Model Law should be up to date, there was a danger that, if it defined future conditions too precisely, it might rapidly become out of date, as the representative of France had rightly suggested.

28. The suggestion by the observer for Sweden was not without merit. His own delegation therefore proposed that both subparagraph (f), defining a "bank", and subparagraph (k), defining "execution", should be deleted. That would leave those words with their ordinary meaning, to be interpreted by the courts.

29. However, the Commission had taken a policy decision on the scope of the Model Law by treating as banks those entities which, as an ordinary part of their business, engaged in executing payment orders. He therefore proposed the addition of a second sentence to article 1(1) which would read: "It applies to other entities that, as an ordinary part of their business, engage in executing payment orders as it applies to banks".

30. It was not necessary to define "execution", because the subject of the Model Law was itself the execution of payment orders. Judges could turn to the substance of the Law to determine if an entity was engaged in a banking activity.

31. Mr. BURMAN (United States of America) said that the United Kingdom proposal offered a possible solution. The intent of the Commission to exclude certain types of transmitting entity would still need to be reflected in the

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commentary. He accepted the point that what was new today could be out of date tomorrow.

32. Mr. KOMAROV (Union of Soviet Socialist Republics) said he liked the United Kingdom proposal. It was a possible solution in view of the nature of the instrument and the conditions it was intended to address.

33. Mr. LIM (Singapore) also supported the United Kingdom proposal. In the context of a Model Law - which was not a convention - the definition of a "bank" was best left to national legislation. His own Government would have been unable to accept the definition in article 2(f).

34. Mr. ABASCAL ZAMORA (Mexico) said that the United Kingdom proposal, if he had understood it aright, might give rise to drafting problems, because the Commission would have to decide what to do about the terms "receiving bank", "intermediary bank", "beneficiary's bank" and "executing bank".

35. Mr. GREGORY (United Kingdom) explained that his proposal would, in effect, move the relevant words from the definition of "bank" to article 1(1). He did not think that it would be necessary to make any change in expressions such as "receiving bank", "beneficiary's bank" and so forth, because the initial rule would make it clear that, where such expressions were used, they would apply to any other entity that was in the same position.

36. Mr. BURMAN (United States of America) suggested that the words "as it applies to banks" should be removed, since they might give the impression that other entities were expected to comply with the same regulations and requirements as banks.

37. Mr. GREGORY (United Kingdom) said that he did not think those words bore such an implication, because the Model Law was concerned with credit transfers. They were probably not essential - although they made the provision read more smoothly - and the effect would no doubt be the same if they were omitted.

38. Mr. AL-NASSER (Observer for Saudi Arabia) suggested, as a possible improvement on the United Kingdom amendment, that article 1(1) should read: "This law applies to credit transfers where a sending bank and its receiving bank are in different States, as well as to other entities which can be regarded as banks in accordance with the legislation of each State."

39. The CHAIRMAN pointed out that that wording would not be in keeping with the Commission's decision to broaden the scope of the Law's application to all entities which engaged in executing payment orders as an ordinary part of their business.

40. Mr. ERIKSSON (Observer for Sweden) suggested, as an alternative which might solve the problems of the United States representative, that the proposed second sentence in article 1(1) might begin with words on the

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following lines: "What is stated in this model law concerning banks applies also to other entities which, as part of their business, engage in executing payment orders."

41. Mr. GREGORY (United Kingdom) thanked the observer for Sweden for his suggestion - although the words "In this law, references to banks include other entities which, as an ordinary part of their business ..." might be more consistent with English legislative style. However, the suggested wording might cause other problems if it were interpreted as meaning that the other entities were, in some way, banks. If neutral words were used, the Law would apply to other entities, particularly if the words at the end "as it applies to banks" were deleted, so as to dissociate the banks and the other entities.

42. Mr. LOPEZ ROCA (Observer for Colombia) said that, if he had understood it correctly, the earlier Swedish suggestion would meet one of the problems of the Mexican representative but would still not solve the problem of what to do with the definitions of "receiving bank", "intermediary bank" and so forth, because the definitions would then apply to the entities which were banks. The statement that the Law was applicable to banks and also to other entities did not mean that any reference to banks should be understood as including other credit transfer entities. However, the latest Swedish suggestion that a reference in the Model Law to banks also meant a reference to other entities dealing with credit transfers might be the solution.

43. Mr. ABASCAL ZAMORA (Mexico) said that the Commission seemed to be engaged in drafting rather than in discussing substance. The insertion of a definition in an article which established the sphere of application of the Law rather than in its natural place, the article on definitions, would make the Law complex and difficult to read. The basic problem facing the Commission was to identify what was meant by the word bank or whatever replacement word it chose. The Commission must find a clear definition and be itself clear about the functions of those entities that were to be called banks.

44. So far it had reached agreement that clearing houses, messenger systems and fund transfer systems should be eliminated - although the situation might change in the future. He therefore proposed that the Commission should take note of the proposals made by the United Kingdom representative and of the United States delegation's objections to the word "merely" and ask an informal drafting group to produce a text. Drafting in the Commission itself would only make the issue more complicated.

45. The CHAIRMAN said that the Commission was still discussing substance. He asked whether it accepted the United Kingdom approach, namely, to eliminate the definition of "bank", which was a source of controversy. The term "bank" would thus not be defined, but the proposed additional sentence to article 1(1) would clarify what was meant and would give it a broader scope than the definition in article 2(f).

46. It was so agreed.

47. The CHAIRMAN suggested that the representatives of Singapore, the United States and the United Kingdom and the observer for Sweden might be asked to prepare a text for consideration by the Commission as soon as possible, without expanding or enlarging the substance in any way.

48. It was so decided.

49. Ms. KRAG JORGENSEN (Denmark) said that she favoured the Swedish and United Kingdom wordings and agreed with the underlying approach. However, after listening to the debate and examining the new text proposed by the United Kingdom delegation, she found that it left a gap in the application of the Model Law. She was raising the point as a matter for reflection. The Model Law would apply to banks and other entities which, as an ordinary part of their business, engaged in executing payment orders, the criterion being "as an ordinary part of their business". She wondered, however, whether entities which engaged in executing payment orders, not as an ordinary part of their business but from time to time should be excluded from the sphere of application of the Model Law.

50. U NYI NYI THAN (Observer for Myanmar) said that, in a traditional Asian society, there were forms of credit transfer by wholesale trading houses, dealing in potatoes or onions or the like, which were more efficient than the State banks.

51. Mr. VASSEUR (Banking Federation of the European Community) said that article 1(1) had been extended to cover entities other than banks and the United States representative had referred to transmitting entities, such as SWIFT, which normally transmitted messages only but could, on occasion, do more. On behalf of his Federation, he would like a written assurance that such entities, whose main function was to transmit messages, would not be covered by the Model Law, since they did not execute payment orders in the sense understood by the Model Law.

52. The CHAIRMAN said that it was clear that SWIFT, as it currently operated, would not be covered by the Model Law, and he did not think that any speaker had said that it would. The United States representative had said, when justifying his proposal, that there might be doubts, but no one else had agreed. The observer for the Banking Federation could rest assured, therefore, that it was the understanding of the Commission that transmitting entities, such as SWIFT, would not, as they currently operated, be covered by the Law.

53. In reply to the representative of Denmark, he thought that the words "as an ordinary part of its business" were subject to interpretation. In some cases, entities which engaged in executing payment orders from time to time might be included in the scope of the Model Law.

54. Ms. KRAG JORGENSEN (Denmark) said that a possible solution to the problem of the Model Law's sphere of application would be to state that it applied to banks and other entities "whenever they engaged in executing payment orders".

55. The CHAIRMAN said that, although the phrase "as an ordinary part of its business" could not be omitted, it could be interpreted quite broadly.

56. Mr. AZZIMAN (Morocco) said that the term "purported sender" actually appeared for the first time in article 2(j). He would have no objection, however, if its meaning were clarified later in article 4.

57. The CHAIRMAN said that a decision as to whether or not a definition of the term was needed could be taken when article 4 was being discussed. If its meaning was made sufficiently clear in article 4, a definition could be dispensed with.

58. Mr. BERGSTEN (Secretary of the Commission) said that it had become apparent when the Secretariat's comments were being prepared (A/CN.9/346) that a problem of definition might arise with respect to the term "beneficiary's bank": the question was whether the "beneficiary's bank" was the bank named as such in the payment order sent to that bank or the bank named by the originator. Before dealing with that problem, however, the Commission might first wish to discuss the substantive issues raised in later provisions, particularly in articles 13, 14 and 17.

59. The CHAIRMAN said that, if the Commission was able to accept the interpretation given in the Secretariat's comments (A/CN.9/346, p. 48, para. 8, and p. 91, paras. 4 to 6), it might be unnecessary to define the term "beneficiary's bank".

Article 3

60. The CHAIRMAN said that two approaches to article 3 were possible, the first being the one adopted in the current text and the second, and opposite, approach being a provision along the lines of: "except as otherwise provided in this law, no agreement is possible on the rights and obligations of a party to a credit transfer".

61. If the first approach was adopted, it would be understood that only articles 1 and 2 were not capable of variation whereas, if the second approach was favoured, parties would be able to change only those provisions which were specified by the Model Law as being capable of variation. It should be borne in mind, in that connection, that the approach favoured by the Commission would have a bearing on its consideration of each subsequent provision of the Law.

62. Mr. GREGORY (United Kingdom) said that, as was clear from his Government's comments (A/CN.9/347, pp. 55-56), his delegation tended to favour the second approach. It thought, moreover, that the Law should not only indicate which provisions were capable of variation, but also which provisions should be given mandatory force. Discussion of that matter would inevitably involve questions of substance as well as drafting.

63. While English common law enshrined the principle of freedom of contract, it was clear that, in the case of the Model Law, such freedom should be constrained in a number of instances to ensure the smooth operation of the mechanism of international credit transfers. It was essential to preclude

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situations in which an agreement to vary the provisions of the Law might detract from the rights of other parties to a credit transfer that were not parties to the agreement.

64. Mr. VASSEUR (Banking Federation of the European Community), referring to the Federation's comments on the matter in question (A/CN.9/347, p. 67), said he endorsed the remarks made by the representative of Germany and the observer for Switzerland in support of greater contractual freedom. It was the unanimous view of all the banking associations making up the Federation that practice should evolve according to need. Since there was as yet no specific legislation in the European Economic Community governing international credit transfers, such transactions were currently subject to freedom of contract, a principle which might be restricted by the Model Law.

65. The European Commission, which had carried out studies on methods of payment in the European internal market, had unofficially indicated that it might well adopt as a directive the text produced by the Commission. That was the reason for his Federation's particularly keen concern that the Model Law should not lead to the adoption of provisions which could confuse banking operations and create serious difficulties.

66. Mr. ABASCAL ZAMORA (Mexico) said that the Working Group had decided to enshrine the principle of freedom of choice, as one might expect in an area of the law concerning private relations, and to review each article separately to determine whether or not such freedom could be preserved. He did not share the concern of the United Kingdom delegation that an agreement to vary the provisions of the Model Law might affect the rights of other parties, since a contractual agreement between an originator and his bank could not create rights and obligations for parties not bound by the agreement.

67. The CHAIRMAN said that there seemed to be a general trend in the Commission towards adopting the first of the two approaches he had mentioned and examining each provision in the light thereof.

68. Mr. BHALA (United States of America) said he was not convinced by the argument put forward by the United Kingdom representative to the effect that freedom of contract should be restricted if the rights and obligations of other parties might be affected. The Model Law was, after all, intended to deal with that precise subject of rights and obligations, and the parties to credit transfers should be allowed to vary such rights and obligations as they deemed fit. Any approach not allowing for freedom of contract and flexibility in the market-place was doomed to become increasingly out of date.

69. As for the Commission's procedural approach to the matter, he would prefer that it retain freedom of contract as a basic rule rather than examine each provision to determine whether such freedom should be retained or omitted.

The meeting rose at 12.40 p.m.